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THE LAW OF SPORTS. By John C. Weistart and Cym H. Lowell. Indianapolis: The Bobbs-Merrill Company, 1979. Pp. 1154. $37.50.

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Once esteemed as mere recreational diversion from the important matters of life, production of sports is now a profitable industry. And, just as stink clings to an agitated skunk, lawyers seek to participate in the affairs of commercial success. The consequences are a flood of litigation and threats of legal action that often push the game scores to the rear of the sports section. The always succinct Jimmy Piersall complains that "[t]he lawyers have gotten into baseball—and the world—and screwed it up. They've created so much hate and so much constant demand for going to court."[1] On the assumption that the burgeoning increase in litigation has created a field identifiable as "The Law of Sports," Weistart and Lowell describe the major problem areas.

The authors suggest that a "specially focused analysis," the reliance on "unique" legal doctrines and the presence of "peculiar" factual settings[2] identify sports litigation as an exclusive body of law. On this point the authors are forcing their argument; in fact, these "justifications" apply to any industry. For example, favorite antitrust targets like motion picture production, real estate marketing and the computer industry exude nuances exclusive to those particular fields. The same can be said for the contract "specialties" of insurance and heavy construction.

The *raison d'etre* for this treatise is the powerful stranglehold that sports has on the collective psyche of this nation. If Marx were alive, he would preach that sports, not religion, is the debilitating opiate of the masses. Unlike other countries, where sports are considered either a diversion from useful endeavors or, as in communist countries, a form of politics, Americans have elevated athletic competition to the level of a cult. The cult exults over competition and idealizes winning,

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1. Schulian, *Jimmy Piersall*, SPORT, August 1979, at 53, 58.

2. J. WEISTART & C. LOWELL, THE LAW OF SPORTS at xviii-xix (1979).

whatever the cost and however accomplished. As Neil Isaacs states in *Jock Culture U.S.A.*, "Sport is a constant, a model, a value system."[3]

In the comprehensive style of the treatise format, Weistart and Lowell analyze the legal problems of the sports cult. The sweep of the discussion is extensive, tracing the evolution of the cult from amateurism to universal commercialization and from informal conflicts resolution to bitter litigation. The style is succinct, the research is thorough, and the footnotes inform and embellish as well as confirm sources. The overall effect is an interesting and effectively developed blend of history and legal explication.

The treatise is organized according to the traditional categories of contracts, antitrust, labor and torts. There are also chapters on the public and private regulation of sports activities. Consistent with my teaching specialties, this Review will focus on contracts and antitrust.

The analysis in the contracts chapter demonstrates that established doctrines can competently handle whatever sports contract problems arise. The pragmatism of Corbin, the ageless symmetry of Williston and the teaching from familiar precedent like *Lumley v. Wagner*[4] suffice to resolve disagreements between owners and players. If there is anything out of the ordinary about "sports contracts," it is the important role that arbitration plays in shaping the relationship between management and player. The ins and outs of arbitration are also thoroughly covered in *The Law of Sports*.

It is in the contracts section that some of the unsavory manifestations of the cult are exposed. Contract dialogue reveals a battle between owners seeking to possess the bodies and souls of athletes and greedy players resorting to any ploy to get more money. In disgust, a trial court described the struggle as "a fight characterized by deception, double dealing, campus jumping, secret alumni subsidation, semi-professionalism and professionalism."[5] If there is an ironic twist to this sordid scenario, it is that selfish players and autocratic owners have met their match in unscrupulous flesh-peddling agents. The irony extends to fanatic fans who are now drenched by the socio-political, jock-itch journalism of vacuous sports commentators.

Antitrust is the catalyst that stripped legal innocence from the

3. N. ISAACS, JOCK CULTURE U.S.A. 17 (1978).

4. 42 Eng. Rep. 687 (1852).

5. Detroit Football Co. v. Robinson, 186 F. Supp. 933, 934 (E.D. La.), *aff'd*, 283 F.2d 657 (5th Cir. 1960). For a discussion of the "often unsavory context" of player-owner contract disputes, see J. WEISTART & C. LOWELL, *supra* note 2, § 4.03.

sports cult. In the longest section of the treatise—300 pages—Weistart and Lowell describe how the cutting edge of antitrust litigation exposed the blatant commercialization of professional sports, thereby providing the justification for evaluating the conduct of professional leagues according to conventional restraint of trade analysis. Another significant consequence of the antitrust attack is that when the dust from the initial sweep of litigation settled, players had achieved bargaining parity with management. It is antitrust that set the stage for player mobility, free agency, astronomical wages, the demise of team loyalty and fan disenchantment.

Despite a vigorous attack, antitrust enforcement has on occasion succumbed to some of the myths and *a priori* assumptions of the sports cult. There is, for example, the treatment of player restraints. Strict antitrust doctrine decrees a completely free market for player services and condemns collective efforts by owners to inhibit movement as per se illegal under familiar boycott decisions. The conventional wisdom of the professional sports establishment is that restraints are needed to preserve the competitive balance that assures fan interest and financial support for all teams. Despite the lack of empirical support for the cult's argument, both players and courts have accepted varying forms of restrictions on player mobility.

The baseball antitrust exemption is the most perverse manifestation of the lingering influence of the cult. In rejecting Curt Flood's attack on the reserve clause, Judge Cooper took judicial notice that baseball is so entangled in the affairs of the nation as to be "everybody's business."[6] (Judge Cooper obviously has never experienced the agony of watching the Cleveland Indians.) In approving Judge Cooper's decision, the Supreme Court confessed that its special treatment was an "aberration."[7] Then, in an idiosyncratic capitulation to the sports cult, the Court justified its bizarre decision on the ground that the "aberration has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis* . . . . It rests on a recognition and an acceptance of baseball's unique characteristics and needs."[8]

Once antitrust enforcement settles on an industry, conduct once taken for granted as a necessary function of the system must be

6. Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

7. Flood v. Kuhn, 407 U.S. 258, 282 (1972).

8. *Id.*

examined for potential illegality. The authors' thorough inquiry produces some seemingly innocuous restraints in professional sports—such as the baseball designated hitter rule, football rule changes to enhance running and field goal limitations and team roster limits—which can adversely affect the economic opportunity of players and, therefore, be deemed restraints of trade. As the authors correctly surmise, these restraints are trivial, constituting titillating cocktail party conversation pieces, and the "leagues are not likely to encounter significant difficulty" over their use.[9]

To add to the list of exotic restraints, Weistart and Lowell could have mentioned the acquisition of Catfish Hunter (or Reggie Jackson, Rich Gossage, etc.) by the New York Yankees as an illegal asset acquisition under Clayton 7, the attempt by Sandy Koufax and Don Drysdale to "tie" their services together in negotiating with the Los Angeles Dodgers as a tying arrangement, and the refusal of UPI and an advisory board of coaches to consider NCAA probation teams for national ratings as a group boycott.

Historically, one of the most effective defenses used by professional leagues against legal attack has been to trivialize their restraints of trade as incidental maneuvers necessary to preserve the ideal of competitive balance. *The Law of Sports* indicates that this ploy has lost much of its credibility. It is thus somewhat surprising that the authors fail to emphasize the impending demise of the trivialization tactics on the university level.

Below the professional level, trivialization of restraints of trade is perpetrated under the rubric of "amateurism." Athletes are advertised as students who, in the off hours away from dedication to the books, happen to participate in organized sports—hence the myth of the "student-athlete," whose participation in sports is an ancillary function of the educational process. The NCAA is the advertising agency for "student-athletes" and their employers, purportedly acting as the guardian of amateurism in the intercollegiate sports system. On the Division I level, where the major sports factories operate, these assertions are patently flim-flam.

Under orders to be self-supporting, athletic departments operate as independent "profit centers." This delegation of autonomy is relied upon to justify big-time sports programs accountable only to alumni

9. J. WEISTART & C. LOWELL, *supra* note 2, at 630.

and the vicissitudes of the recruiting market. The separation of university administration from athletic affairs was dramatized in the Chuck Fairbanks litigation. A lawsuit brought by the New England Patriots against Coach Fairbanks and the University of Colorado for breach of contract was settled by a payment of $200,000 by the Flatirons, a private booster group with assets of $1.4 million. The school's minor role is further revealed in Fairbanks' salary arrangements: Colorado pays him $45,000, Vickers Petroleum adds $90,000.[10]

Competition for athletic talent among the major collegiate sport profit centers is more intense and cut-throat than between auto manufacturers. Blue-chip recruits are hounded by hundreds of schools. The better the athlete, the greater the likelihood of "under-the-table" inducements and other shady practices. Cutting at the myth of the "student-athlete," a lawsuit filed against California State University at Los Angeles alleges that the plaintiffs, highly recruited high school stars, were steered by the coaching staff "into educationally valueless curricula designed solely to maintain their playing eligibility."[11] Under these conditions the existence of the "student-athlete" is accepted by only the naive or disingenuous. The pros are neither—they realistically view Division I schools as talent feeders and as minor leagues whose primary function is to give future prospects playing experience.

The growing recognition of extreme commercialization at the expense of any educational emphasis places big-time college athletics in the same position the pros were ten years ago—vulnerable to an inevitable avalanche of lawsuits. Weistart and Lowell evaluate possible NCAA antitrust liability, conclude that courts would initially employ a "rule of reason" analysis, and observe that the most dangerous conduct by the NCAA is imposing cost limitations that affect groups, such as assistant coaches, not represented in the decisionmaking process.

In this area, the authors fail to press forward their analysis. For example, in the crypto-professional sports programs conducted by many Division I schools—usually in football and basketball—restraints on inter-school player mobility and eligibility restrictions should receive close scrutiny. Another practice that cries out for antitrust analysis is the requirement that purchasers of season tickets make donations to the athletic programs, a practice that may constitute an illegal tying arrangement. Group sanctions against players and coaches for infractions of NCAA or league rules can no longer be implemented without danger of court supervision for procedural fairness. To justify

10. N.Y. Times, Apr. 4, 1979, at 19-20.
11. 65 A.B.A.J. 540 (1979).

restraints, schools and conferences will have to prove the existence of a nexus between the sports "profit center" and the education function, a burden that many schools may find difficult. Also likely to be tested are the NCAA procedures and justifications for banning teams from participating in bowls and appearing on television. An immediate threat comes from the sponsors of basketball's National Invitational Tournament, who are considering filing antitrust charges against the NCAA for prohibiting teams selected for its tournament from participating in the NIT.[12]

The Law of Sports has some minor flaws. There is, for example, no discussion of the professional football tie-in cases (generally pre-season game tickets tied to regular season tickets),[13] which were resolved in a manner inconsistent with the typical per se treatment. By conveying the impression that they are polar concepts, the explanation of how the per se and "rule of reason" analyses are applied is somewhat simplistic. These are, however, minor imperfections that fail to detract from the high quality of an excellent treatise.

12. SPORTS ILLUSTRATED, August 27, 1979, at 6.

13. Because each professional football team has a legal monopoly in its franchise area, courts have correctly held that tie-in of pre-season and season games cannot harm nonexistent competition. Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). This ignores the "virtual" per se rule, which does not require proof of adverse effects on competition. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).